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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 94-48
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

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To: The Commission

REPLY COMMENTS

1. American Telecasting, Inc. ("ATEL"), by its attorneys, hereby respectfully submits its reply comments in response to the Notice of Inquiry, FCC 94-119 ("NOI") in the above-referenced proceeding released by the Commission on May 19, 1994. ATEL is a public company that is the country's largest provider of wireless cable service. As the leading member of an industry whose development the Commission has repeatedly cited as the means by which to obtain much needed competition to coaxial cable operators, ATEL welcomes the Commission's examination of the status of competition in the market for the delivery of video programming services and the opportunity to inform the Commission about discriminatory access to programming and the anti-competitive practices of cable operators.

2. Quite predictably, the comments submitted in this proceeding by the cable industry attempt to assure the Commission that competition is flourishing and that no additional Commission regulation is necessary. The comments submitted by the alternative

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programming providers demonstrate the contrary, that anti-competitive behavior and discriminatory practices are still prevalent. ATEL concurs in many of the comments and recommendations that were submitted by the alternative programming providers in response to the NOI, especially the comments submitted by the wireless cable industry trade association, the Wireless Cable Association International, Inc. ("WCAI"). While there is no doubt that alternative programming providers have become greater competition to cable since the passage of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing Rules, many barriers to their emergence as true competitors to cable remain. Contrary to the comments of the cable industry, discrimination against these alternative programming providers still exists and the cable industry continues to act in an anti-competitive fashion. ATEL's comments will demonstrate the extent to which this discrimination still exists.

I. BACKGROUND

3. WCAI estimates that there are currently 143 wireless cable systems in operation throughout the United States.[1/] In addition, it estimates that twenty-eight new systems will be serving subscribers by the end of the year and another sixty-one systems are currently in development.[2/] Wireless cable certainly

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1/ See Comments of WCAI at 2.

2/ Id. at Attachment A.

has the potential to be a serious competitor to cable, as the Commission has repeatedly recognized, and is in some markets, but as long as the cable industry is permitted to act anti-competitively and programmers are permitted to discriminate, wireless cable and the other alternative programming providers will not achieve their full competitive potential. Until this happens, the public will not have the benefits of full consumer choice, competitive prices or improved quality of service. ATEL urges the Commission to clarify its Rules in order to ensure that alternative programming providers are not subject to the continuing anti-competitive and non-discriminatory practices of the cable industry.

II. THE CABLE INDUSTRY CONTINUES TO ENGAGE IN ANTI-COMPETITIVE BEHAVIOR

4. One purpose of the 1992 Cable Act was to:

> foster the development of competition to cable operators by requiring that programming be made available to all multichannel video programming distributors on fair terms and conditions.[3/]

While the cable industry has certainly become less anti-competitive than it was before the 1992 Cable Act and the Commission's implementing Rules, conditions remain far from competitive.

5. The commenters provide many examples of the anti-competitive and discriminatory practices of the cable industry. For example, one commenter described the following situation: every time it approached a multiple dwelling unit, hotel or institutional user about switching to its service, the local cable

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[3/] See NOI at 3, ¶ 3.

operator would come through with an offer at least twenty five percent less than its normal rate in order to undercut the commenter's proposal and retain the customer.[4] The same commenter gives examples of the cable operator offering bulk pricing discounts and other incentives (e.g. free security systems) only to those customers who may consider switching from cable to the commenter's service.[5] ATEL has been the victim of anti-competitive actions very similar to those described by the commenters in this proceeding.

6. One wireless cable operator told about when the local cable operator made an anti-competitive offer to buy the antennas of the commenter's customers. This offer was not made to the entire area covered by the cable system or to consumers who had antennas not receiving the wireless cable signal.[6] There are also examples of cable operators paying an ITFS licensee not to lease its excess capacity to wireless cable operators.[7]

7. All of these examples provide ample evidence that anti-competitive practices still exist, and that the Commission must clarify its Rules in order to foster competition.

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[4] See Comments of Liberty Cable Company, Inc. ("LCCI") at 9-10.

[5] See Comments of LCCI at 10-11.

[6] See Comments of Peoples Choice-TV Corp. ("PCTC") at 3.

[7] See Comments of PCTC at 4.

A. Programming Rates and Access

8. The cable industry states that "Congress did not prohibit all price differentials and exclusive contracts, but only those cases where such actions are discriminatory."[8/] While this may be an accurate statement of the law,[9/] one would be hard pressed not to describe the following actions of the cable industry as not being discriminatory.

9. Many of the comments submitted in this proceeding document the high rates that alternative providers are required to pay for programming,[10/] if they are even given access to such programming. The comments also reflect the fact that, aside from price discrimination, alternative video programming providers face programming access discrimination,[11/] often in the guise of

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8/ See Comments of National Cable Television Association ("NCTA") at 26.

9/ See 47 C.F.R. §76.984.

> Cable operators may offer different rates to multiple dwelling units of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, as long as the same rate is offered to buildings of the same size with contracts of similar duration. Id.

10/ See Comments of the Consumer Satellite Systems, Inc., Programmers Clearing House, Inc. and Satellite Receivers, Ltd. ("CSSI") at 3-5, Comments of LCCI at 9-11, Comments of the National Rural Telecommunications Cooperative ("NRTC") at 9-25.

11/ See Comments of WCAI at 13-15, Comments of PCTC at 2, 4-5, Comments of LCCI at 11-16, Comments of CSSI at 5, Comments of DIRECTV, Inc. ("DIRECTV") at 19-22.

exclusive contracts.[12/] Although the Rules prohibit exclusive contracts for satellite programming, unless such contracts are found to be in the public interest,[13/] other types of exclusive contracts are permitted, such as those for programming delivered by fiber optics.[14/]

10. Discriminatory prices for access to programming remain for a number of reasons. Sometimes, programming is provided under a contract that was negotiated before the new rules went into effect.[15/] In other instances, rates comparable to those charged cable operators are only available with conditions that alternative providers can never meet, such as high penetration levels.[16/] ATEL has no access to rate cards and therefore, cannot compare actual prices, but every indication is that the prices offered to ATEL and other alternative programming providers are higher than those offered to cable operators of the same size.

11. One vertically integrated programming provider describes the process by which it permits carriage:

> [i]n determining whether to distribute its product through a potential wireless cable operator, HBO reviews the prospective wireless affiliate's business plan to determine its financial and technical viability. Once it

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12/ See Comments of LCCI at 15-16, Comments of NRTC at 10-11, 20-25.

13/ 1992 Cable Act, 47 U.S.C. §628(c)(2)(D).

14/ See Comments of LCCI at 11-12, Comments of DIRECTV at 9-10.

15/ See Comments of CSSI at 3-4.

16/ See Comments of CSSI at 5, Comments of NRTC at 15-17.

> believes that the company is viable, HBO will seek to enter into an arrangement with that distributor.[17]

Without claiming that HBO discriminates against alternative programming providers or not, the huge amount of flexibility left to programmers could easily permit the adoption of discriminatory rates and access.

12. While vertically integrated programmers are prohibited from discrimination in selecting whom they permit to carry their programming, non-vertically integrated programmers are not similarly restricted,[18] even though non-vertically integrated programmers are subject to the market power of the cable industry through "fear of retaliation."[19] In order for alternative programming providers to truly have access to all programming, all programmers should be prohibited from discriminating in choosing whom they provide access to.

13. While the Commission's Rules permit programmers to bring complaints against discriminatory or anti-competitive actions by cable operators, cable's market power restricts such complaints. The Rules do not provide alternative video providers with a complaint procedure.[20] As the Rules do not specifically define what is meant by uniform rates and access, and alternative

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17/ See Comments of Home Box Office ("HBO") at 12.

18/ See 1992 Cable Act, 47 U.S.C. §628.

19/ See Comments of WCAI at 14, Comments of LCCI at 15-16, Comments of PCTC at 2.

20/ See Comments of LCCI at 22-23.

programming providers do not have a way to complain, the Commission's current Rules do not and will not have the desired effect in eliminating anti-competitive behavior. In order for true competition to flourish, the Commission must clarify its Rules to prohibit predatory pricing practices and discriminatory rates for and access to programming.

B. Other Anti-Competitive Behavior.

14. Discrimination is not limited to rates for and access to programming. The cable industry has found creative ways to circumvent the Commission's Rules. For example, Section 74.931(h) prohibits a cable operator from leasing ITFS channels within twenty miles of its franchise area. Commenters have described how cable operators get around this requirement, by paying ITFS licensees not to lease channels to wireless cable.[21/]

15. Commenters describe a second anti-competitive practice that cable operators have designed to get around the Rules, whereby a cable operator will offer to pre-wire new homes or a new building at no cost in exchange for deed covenants or building rules which forever prohibit the installation of rooftop antennas.[22/]

16. The Commission must clarify its Rules in order to eliminate these loopholes that allow cable operators to take such anti-competitive actions.

21/ See Comments of WCAI at 23-26, Comments of PCTC at 4.

22/ See Comments of WCAI at 26.

III. LIMITED CHANNEL CAPACITY

17. One reason for wireless cable's slow growth has been the limited channel capacity that is available to such operators. A maximum of only thirty three channels in a market are currently available to wireless cable operators through the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS"). Often, some of these channels are already in use by ITFS licensees for educational purposes. In addition, the slow application processing times and Commission freezes on application processing have contributed to the limited channel capacity available to wireless cable systems. As ATEL has advocated to the Commission in other proceedings, revision of the pertinent rules to allow expedited processing of applications connected with established wireless cable operators will deter speculative filings and expedite competitive service to the public.

IV. WIRELESS CABLE OPERATORS SHOULD BE PERMITTED TO WIRE AREAS THAT DO NOT CROSS A PUBLIC RIGHT-OF-WAY

18. The current Rules prohibit wireless cable operators from using wire to interconnect homes in subdivisions or trailer parks without a cable franchise, even where the wire is purely on private property and does not cross and public rights-of-way.[23] The commenters indicate that it would increase their capabilities if they were permitted this limited amount of home wiring.[24] Such

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23/ 1992 Cable Act, 47 U.S.C. §§ 602(7), 621(b)(2).

24/ *See* Comments of WCAI at 16-19, Comments of LCCI at 16-18, 24-25.

action often becomes necessary where local rules may prohibit antennas or local terrain makes such wiring necessary in limited situations. Permitting such action by wireless cable operators will further increase the competitive ability of wireless cable.

V. CONCLUSION

19. ATEL agrees with, and supports many of the comments submitted in this proceeding by alternative programming providers and WCAI. For the reasons noted above, the Commission should clarify the existing Rules and, if necessary, adopt additional Rules in order to ensure that alternative video providers are not victims of the anti-competitive practices of the cable industry. Such clarification will serve the public interest by ensuring that consumers receive the best possible rates and service.

Respectfully submitted,

AMERICAN TELECASTING, INC.

By: ______________________

William D. Freedman
Nadja S. Sodos

Gurman, Kurtis, Blask & Freedman, Chartered
1400 16th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 328-8200

Its Attorneys

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